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NO. 276

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

EMMETT GRAY, *Petitioner*

-versus-

EDWIN L. JOHANSSON, KANSAS CITY BRIDGE CO., MERRITT-CHAPMAN & SCOTT CORP., AND PELICAN ISLAND DEVELOPMENT CORP., AND MARITIME OVERSEAS CORPORATION,

Respondents

PETITION FOR REHEARING

Of Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

To The Honorable The Chief Justice and Associate Justices of The Supreme Court of the United States:

Emmett Gray, petitioner herein, respectfully petitions this Honorable Court for a rehearing herein of the order of this Honorable Court entered herein on October 9, 1961, denying his petition for a writ of certiorari to issue

to review the judgment of the United States Court of Appeals for the Fifth Circuit, and would respectfully show that there exist intervening circumstances of substantial effect and other substantial grounds not previously presented, as follows:

GROUNDS FOR ALLOWING REHEARING AND GRANT OF PETITION

1.

Since the decision by the Court of Appeals of this case and the filing of the petition for writ of certiorari, the District Court for the Southern District of New York on March 16, 1961, has decided the case of *International Terminal Operating Co., Inc. v. Naviera Azuar S. A., et al.*, 1961 *American Maritime Cases* 1758, not yet reported elsewhere, which affirms once more the validity in the Second Circuit of the exculpatory pilotage clause provisions of a harbor towing contract such as are embodied in the towing contract in this instant case, and petitioner's right to indemnity, vividly demonstrating once again that the decisions below denying validity of the exculpatory clause are in direct conflict with the rule of law followed in the Second Circuit, which was recognized and not repudiated by Your Honors in *United States v. Chris Nielson*, 349 U.S. 179, and in all other American jurisdictions where it has been before the courts as well as in England, and showing the plain injustice of holding petitioner Gray personally liable for very large sums.

2.

There can be no doubt that under the undisputed evidence in this case and giving effect to other holdings of the decisions below that petitioner Gray was the servant

or agent of his master Bay-Houston Towing Company while aboard the vessel directing the towing operation, and hence fully exculpated from liability to and entitled to indemnity from the vessel and respondent Maritime Overseas Corporation as a third-party beneficiary of the contract between Bay-Houston Towing Company and Maritime Overseas Corporation.

STATEMENT

Bay-Houston Towing Company made a written contract with respondent Maritime Overseas Corporation to furnish in certain named Texas ports all harbor tug service it would require, and at Galveston-Texas City to furnish pilotage for shifting vessels not having their own power. An exact copy of the entire contract, except for signatures, is reproduced as Appendix IV below. The exculpatory pilotage clause is as follows:

> Whenever any pilot goes on board a vessel to assist her movement or handling, he becomes and continues to be solely the servant, agent and employee of said vessel, and her owners and/or charterers in respect of all acts done by him, or all omissions, and all orders given by him to any tugs engaged or to said vessel or otherwise, in the movement or handling of said vessel, or in connection with any decisions made by said pilot as to the manner or method of handling said vessel, and none of the tugs or their owners, agents, Masters, servants, employees or charterers shall be responsible or liable for any act or omission of said pilot, or for any claims or damages caused by or resulting from any act, omission or order of said pilot.

The M/V HAR CANAAN, operated by repondent Maritime Overseas Corporation, did not have the use of

her engines, and her agents desired that she be shifted within the confines of Galveston harbor. To perform its contractual undertaking and in strict conformity with the contract above referred to, Bay-Houston Towing Company caused the ship to be shifted by three tugs, one of which it itself owned and the other two being owned by another company, and it also furnished to the ship a "dead-ship" pilot, petitioner Emmett Gray. For all of these services Bay-Houston Towing Company rendered its bills to respondent Maritime Overseas Corporation and was paid in accordance with the contract. The amounts so billed and paid of course included tug hire and pilotage charges, which were billed separately.

In the harbor movement of the ship so performed in accordance with the Bay-Houston Towing Company contract, the M/V HAR CANAAN's anchor was dropped on and damaged a pipe line, and the trial court found the damage caused by petitioner Gray's negligence.

The tugs so furnished to the ship under the contract with Bay-Houston Towing Company were actually operated by a separate and distinct corporation, G. & H. Towing Company, which chartered the tugs from their owners and manned and operated them. Petitioner was in the general employment of G. & H. Towing Company as its Galveston port captain, and he was licensed under the laws of the United States (not under Texas laws) as a pilot for the waters of Galveston harbor. As its port captain he acted in Galveston harbor waters upon request as dead-ship pilot of oceangoing vessels, for at the time the state-licensed Galveston bar pilots did not perform such pilotage.

G. & H. Towing Company had no contractual relations of any kind with Maritime Overseas Corporation. Its

contractual relations and agreements were *only* with Bay-Houston Towing Company (as well as with two other separate and independent tug-owning corporations). If any request was made to petitioner's employer G. & H. Towing Company for someone to act as dead-ship pilot, petitioner Gray was sent. For his services he was paid part of the amount charged for such pilotage, over and above his regular salary.

Under its agreements with Bay-Houston Towing Company, G. & H. Towing Company was paid by Bay-Houston Towing Company (*not* by Maritime Overseas Corporation, to whom it rendered no bills nor presented any claims and of course with whom it had no agreements) a percentage of the amounts (including the amount paid for pilotage) contracted to be and actually paid to Bay-Houston Towing Company by respondent Maritime Overseas Corporation. Out of the portion paid to it by Bay-Houston Towing Company for the pilot's services, G. & H. Towing Company paid petitioner a percentage.

The libel *in personam* against Bay-Houston Towing Company was dismissed by the trial court, and no appeal from that decree taken. All claims against the tugs *in rem* were dismissed, and neither G. & H. Towing Company as operator of the tugs, nor Bay-Houston Towing Company, nor Suderman & Young Towing Company (the owner of two of the tugs) was held liable. No appeal was taken from these portions of the decree.

Petitioner Gray was held personally liable and G. & H. Towing Company was held liable as his principal, by the trial court. The trial court decides that "Gray was acting within the scope and course of his employment by *G. & H. Towing Company* and was not a loaned servant *to the vessel or her operators*." The Court of Appeals par-

ticularly states that petitioner Gray "was merely the person in direct command with respect to a dead ship towing operation," that this "is a mere case of towing service *furnished by G. & H. Towing Company* and performed by its port captain." (Italics ours.)

The decisions below therefore clearly find petitioner Gray an agent, servant, or employee while aboard the vessel, even though the servant of his general employer, G. & H. Towing Company. The exculpatory pilotage clause quoted above consequently completely protects petitioner Gray but for the further holding that the pilotage clause is invalid and void in Galveston harbor. Directly contrary to the numerous holdings by the courts of the Second Circuit that such a pilotage clause requires the vessel to indemnify the towing tugs and their agents, holdings now affirmed as still the law by the recent decision of the New York District Court in *International Terminal Operating Co., Inc. v. Naviera Aznar S. A., et al.*, 1961 A.M.C. 1758, the courts below have held petitioner liable to indemnify the vessel.

ARGUMENT

Petitioner is Covered by the Piltotage Clause

Since both Courts below have held petitioner the servant of the towing company, even though that company is found to have been, erroneously it is submitted, G. & H. Towing Company and not Bay-Houston Towing Company, it is established by these holdings that petitioner is an agent or servant of the towing company. Whether he be called the pilot, as he is so denominated by the trial court, or simply an employee in charge of a towing operation, as he is termed by the Court of Appeals (which is really equally a designation of any pilot aboard a vessel assisted by tugs) he

nevertheless is thus held to be a servant or agent of the employer performing the towing operation.

Hence there can be no doubt if effect be given to these findings that petitioner is covered by the exculpatory pilotage clause provisions, whether the towing company be the charterer, G. & H. Towing Company, or the tug owner (and contracting towing company, as will be shown below) Bay-Houston Towing Company, for the pilotage clause *expressly frees the agents and employees and servants of the tugs or their owners or charterers of any responsibility or liability in the manner or method of handling the vessel*, the dropping of the anchor has been found to be an incident of the handling of the vessel (dismissal of the claims against the tugs is alone sufficient to show this to be the holdings below), and the courts below have found petitioner the servant of the towing company.

(It is respectfully submitted that the courts below are in clear error in holding petitioner's employer while aboard the vessel his general employer G. & H. Towing Company. The evidence is ample and undisputed that Bay-Houston Towing Company contracted and agreed with Maritime Overseas Corporation to furnish tug power and dead-ship pilotage, that is to say, using the language of the Court of Appeals, it agreed to perform the towing operation of shifting the dead ship within the harbor, and it, *not* G. & H. Towing Company, furnished to the vessel here the towing service performed by petitioner Gray and the tugs.)

But whether the servant of one towing company or the other while aboard the vessel, by the express language of the pilotage clause petitioner was freed from responsibility and liability for his handling of the vessel because undeniably he was an agent or employee of the tug owner or charterer.

Holding Petitioner Liable Over to Maritime Overseas Corporation is Clearly Wrong

The holdings of the courts below are clearly erroneous in making no distinction between the rights of petitioner Gray and those of the tugs and towing companies: He is held personally responsible, for damages claimed to approximate $300,000.00, and it is respectfully submitted that his rights can with justice only be considered separately and apart from the rights of the other respondents, looking at petitioner as an individual.

If such separate examination be carefully given to petitioner's rights, it is submitted the decisions of the courts below are plainly erroneous, for they reject the contractual agreement between Bay-Houston Towing Company and Maritime Overseas Corporation and do so without regard to the resulting effect on the rights of petitioner, and contrary to his clear right as a third-party beneficiary of the contract.

Petitioner respectfully submits he is by the agreement a third-party beneficiary of the contract between Bay-Houston Towing Company and Maritime Overseas Corporation and that it is manifestly unjust and contrary to the decided cases to permit Maritime Overseas Corporation to repudiate the agreement it made *after* the occurrence of the events which made applicable to petitioner its exculpatory provisions. Please see the *Restatement of Contracts*, Vol. 1, Sec. 143, Comment a., p. 170, where the governing doctrine is stated to be:

> "a. The beneficiary is justified in relying on the promise and it is immaterial whether he learns of it from the promisor, the promisee or a third party. If there is a material change of position in reliance on the promise, the change of position precludes dis-

> charge or variation of the contract without his consent. It is not necessary that the creditor beneficiary enter into a novation with the promisor, though a novation would *a fortiori* be effectual,"

and *Williston On Contracts,* Rev. Ed., Vol. 2, Sec. 396, p. 1144, where it is said:

> ". . . it has generally been laid down broadly as true of all cases that prior to the assent or acting upon the promise by the third party but not afterwards, a discharge or variation of the promise is operative."

As stated in *Virgin Islands Corporation v. Merwin Lightcrage Co., Inc.*, D.C. Virgin Islands, 1959, 177 F. Supp. 810:

> "It is well settled that contracting parties may, if they intend to do so validly extend a contractual benefit to a third party."

Of course, as Your Honors in *Robert C. Heard & Co. v. Krawill Machinery Corp.*, 1959, 359 U.S. 297, at 305, cautioned, such intention must be clearly expressed, but of course here the language of the contract between Bay-Houston Towing Company and respondent Maritime Overseas Corporation clearly relieves petitioner from liability and responsibility to Maritime Overseas Corporation.

And yet petitioner is held not only liable to libellants, the respondent pipe line owners; he is held liable and responsible also to Maritime Overseas Corporation and required to indemnify that respondent! What greater denial of his individual rights as a third-party beneficiary of the contract could there be?

The contract says that *in the handling of the vessel* that "none of" the tugs nor their owners nor agents nor employees "shall be responsible or liable." Yet both courts below have held petitioner a servant or employee and have as such held him not only liable but have with a vengeance held him responsible over to Maritime Overseas Corporation by way of indemnity!

How can it be justly urged that the contract should be completely rejected as to this third-party beneficiary and his status converted from one of *no* liability to one of indemnity, so that the petitioner, who manifestly could never have dreamed of such a result, by following the orders of his employer to pilot the vessel subjected himself to personal liability of such magnitude?

Until this case, the settled law certainly has been otherwise. Your Honors in *United States v. Chris Nielson*, 349 U.S. 129, have expressly said that contracts of pilotage should contain express language to be enforceable as contracts of indemnity, and of course by so holding imply that where the language *is* express such a contract *is* enforceable.

What more express language freeing petitioner from liability to respondent Maritime Overseas Corporation and absolving him from any responsibility to indemnify that respondent could there be than the words " . . . and none of the tugs, or their owners, agents . . . servants, employees . . . shall be responsible or liable for any act . . . or for any claims or damages caused . . ."?

Under normal rules of indemnity followed in other fields of law, apt language of such character gives rise to a right of indemnity of the person so contractually freed.

And of course the case of *International Terminal Operating Co., Inc. v. Naviera Aznar S.A., et al.*, 1961

A.M.C. 1758, expressly holds that such is still the law in cases of harbor towing and pilotage in the Second Circuit.

What possible justice can there be in failing to accord this petitioner the same rights found in other branches of law, and in the maritime law, and geographically in the Second Circuit where the greatest volume of maritime commerce in America moves? (In England now *by statute* his personal liability would be limited to approximately $340.00, one hundred pounds plus the pilotage charge!) And yet in Galveston harbor he is held to have no right to rely upon a solemn contract and held contrary to the agreement liable for hundreds of thousands of dollars!

The Recent New York Harbor Decision Shows How Contrary to the Settled Maritime Law Are the Decisions Here Denying Petitioner the Contract's Protection

It might have been thought from the summary treatment accorded by the courts below of the exemptions from liability agreed to for independent consideration by respondent Maritime Overseas Corporation in the so-called pilotage clause that the decisions of Your Honors in the *Bisso* and the *Nielson* cases (*Bisso v. Inland Waterways Corporation*, 349 U.S. 85, and *United States v. Chris Nielson*, 349 U.S. 129) had completely invalidated pilotage clauses generally and particularly made now ineffectual the former Second Circuit view that such a clause is valid and one of indemnity.

But the decision of the New York District Court, before which come by far the greatest number of maritime law cases and having within its jurisdiction by far the most important American port, decided on March 16, 1961, in *International Terminal Operating Co., Inc. v. Naviera*

Aznar S.A., et al., 1961 A.M.C. 1758, and for convenience reprinted here below as Appendix V, demonstrates that in the view of at least that respected maritime court the rule of the Second Circuit still is that generally speaking the pilotage clause is valid and one of indemnity.

Your Honors are respectfully referred to that decision, and especially the court's reliance upon the principal decisions of the Court of Appeals for the Second Circuit, including the holding that the clause is one of indemnity in the following language at page 1763:

> "With reference to the pilotage clause, the pilot was negligent, certainly with respect to 'the handling of such vessel' and, arguably, with respect to 'the giving of orders' to the tug *Turecamo*. He was also negligent in the use he made of that tug in the undocking procedure. In any event, his faults first mentioned are clearly within the purview of the pilotage clause and therefore operate to preclude indemnity in favor of the shipowner, because by virtue of that clause the pilot was the 'servant' of the shipowner for the purpose of those actions. Cf. *West Eldara*, 1939 A.M.C. 877, 104 F. (2d) 670, 671 (2 Cir., 1939). If the faults of the pilot that are within the scope of the pilotage clause were the only basis for imposing liability upon the towing company that party would be entitled to indemnity from the shipowner in accordance with the terms of the towing contract. That is not the sole basis of the liability of the towing company however; at least the separate fault of the *Turecamo* tug operates to prevent the award of such indemnity."

That this recent decision of the District Court in the Southern District of New York is not ill-considered but states the post-Bisso case view held in the Second Circuit is further established by *Pennsylvania Railroad Company v.*

The Beatrice, S.D. N.Y., 1958, 161 F. Supp. 136, affirmed 2 Cir., 275 F. 2d 209.

The denial of validity by the courts below to the pilotage clause is in conflict with decisions in two other circuits decided since the decision of Your Honors in the *Bisso* and *Nielson* cases. These cases are *States Marine Corporation of Delaware v. Victory Carriers, Inc.*, 9 Cir., 1959, 272 F. 2d 463, and the decision in the District Court of Massachusetts in *The Carrabulle (National Distillers Products Corporation v. Boston Tow Boat Co.)*, 134 F. Supp. 194, 1955 A.M.C. 604 and 1925, where on rehearing the decision of Your Honors in *Bisso v. Inland Waterways* was found not to have the effect given it by the courts below.

Petitioner would respectfully urge also here that in the world's other great maritime nation, England, like exculpatory clauses have for many years been held valid, going even beyond the American cases in granting indemnity from the vessel for the actions of the assisting tugs and the tug owners' servants or agents. Please see *President Van Buren*, (1924), 132 L.T. 253, 16 Aspinall M.L.C. 444.

Of course today with respect to the liability of licensed pilots England has dealt with the matter by statute, making the pilot liable for any negligence *but limiting the liability of the pilot* to approximately one hundred pounds. Your Honors are respectfully referred to the *Pilotage Act*, 1913, v. 23 of *Halsey's Statutes of England*, particularly the following sections:

> *Section 15:* Makes the owner or master of vessel liable for a pilot compulsorily employed just as though he were voluntarily employed.
>
> *Section 17:* (pp. 845-846) Gives pilotage Board authority to regulate pilots and to

(i) "provide, if and so far as it appears to the authority to be generally desired by the pilots, for bonds (the penalty of which shall not in any case exceed one hundred pounds) being given by pilots for the purpose of the provisions of this act limiting pilots' liability; and"

Section 35: (p. 857) Where pilot gives the bond provided for by Section 17, he shall not be liable beyond the amount of the bond and the amount payable to him for pilotage for the voyage.

The peculiar position of pilots, and the protection of men whose skills are so essential to the movement of ocean commerce, has, of course, always been a matter of careful concern of this Honorable Court, as shown by the decision in *Kotch v. River Port Pilot Commissioners*, 1947, 330 U.S. 552, at 557, where the court reviewed the essential role of the pilot and used the following language:

"Studies of the long history of pilotage reveal that it is a unique institution and must be judged as such."

Surely the conclusion of the other Courts of Appeals that Your Honors did not intend to deny tugmaster servants of towing companies the protection of pilotage exculpatory clauses by the Bisso decision, and the English view that such clauses are valid and their statutory view limiting a pilot's liability to slightly more than 100 pounds is far better calculated to promote commerce and attract to the harbor movement of vessels the skills of mariners of modest means than the treatment accorded petitioner below in denying him the protection of a clearly expressed agreement of which he was a third-party beneficiary and holding him liable for hundreds of thousands of dollars!

No Considerations of Public Policy Such as "Monopolistic Conditions" or the Ability to Drive "Hard Bargains" Are Applicable to Petitioner Gray's Rights

Petitioner Gray respectfully submits that *certainly as to him* the reasons stated by the trial court for its decision holding the pilotage clause void and thus denying petitioner the protection of the contract do not have any validity. Whatever basis there may be in the facts or circumstances of the present case for the trial court's holding (and there is no showing that conditions in the port of Galveston with respect to the towage of oceangoing vessels are unique and so completely different from such conditions in all the other American harbors and in the ports of the other great maritime nation, England, that harbor towage contracts valid elsewhere should be found invalid in Galveston, Texas), they do not apply to petitioner.

Petitioner had no monopoly of pilotage of vessels in Galveston harbor. Your Honors will of course take judicial knowledge of the pilotage laws of the United States, under which he held a pilot's license for the waters of Galveston harbor, and these of course give no person a monopoly. Even if he had been a state-licensed bar pilot and not simply a federally-licensed pilot, Your Honors have clearly held that monopolistic conditions are *not* against public policy as far as such pilots, whose numbers are limited and hence might be termed "monopolistic," are concerned. *Kotch v. River Port Pilot Commissioners*, 1947, 330 U.S. 552, a case dealing with the neighboring Gulf port of New Orleans, and *Olsen v. Smith*, 1904, 195 U.S. 332.

If petitioner be found merely an employee or servant of a towing company and not really a pilot, certainly there is no showing that he was the only person in the port of

Galveston who could have been engaged to handle the movement of this ship, even though he was the employee of G. & H. Towing Company who was ordinarily assigned to pilot or direct the movement of "dead" ships.

To say that petitioner Gray had the power to drive hard bargains would be fanciful. Of course petitioner was simply an employee, directed to perform certain acts. There is no evidence that he had anything to do with making towing contracts in Galveston harbor. How could he, a simple mariner, drive hard bargains with respect to anyone?

Why should he be placed in the same legal position as his employer?

Why should he, a simple mariner directed by his employer to go aboard the vessel here, and paid a few dollars, be held liable to indemnify the vessel's operator, a common carrier, for hundreds of thousands of dollars, and be denied in Galveston harbor the protection of indemnity accorded tug companies and their agents elsewhere in the world?

CONCLUSION

Petitioner Gray therefore prays that his petition for rehearing be granted and that this Honorable Court grant writ of certiorari to review the decision of the Court of Appeals herein, and on hearing thereafter that decision be in all things reversed as to him and he be granted the relief to which he is justly entitled.

Respectfully submitted,

ROBERT EIKEL
1910 Tennessee Building
Houston 2, Texas
Attorney for Petitioner

CERTIFICATE (Rule 58)

I certify that the within petition for rehearing of the order of the Honorable the Supreme Court of the United States denying the petition for writ of certiorari to issue to the Honorable the Court of Appeals for the Fifth Circuit entered October 9, 1961, is presented in good faith and not for delay and is restricted to the grounds set forth in Rule 58 of the Supreme Court Rules, namely intervening circumstances of substantial effect or other substantial grounds available to petitioner and not previously presented.

ROBERT EIKEL
1910 Tennessee Building
Houston 2, Texas
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that service of the within petition was made upon Armstrong, Bedford & Lambdin, 201 National Hotels Building, Galveston, Texas, and McLeod, Mills, Shirley & Alexander, 801 Santa Fe Building, Galveston, Texas, attorneys for respondents other than Maritime Overseas Corporation, and Eastham, Watson, Dale & Forney, 538 Mellie Esperson Building, Houston, Texas, attorneys for respondent Maritime Overseas Corporation, claimant of the M/V HAR CANAAN, by placing copies thereof properly addressed to each of them in the United States mail with adequate postage ~~affixed thereto~~.

Robert Eikel

APPENDIX I.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 18619

EMMETT GRAY, G & H TOWING COMPANY and MARITIME OVERSEAS CORPORATION,
Appellants

v.

EDWIN E. JOHANSSON, KANSAS CITY BRIDGE COMPANY, MERRITT-CHAPMAN & SCOTT CORPORATION, and PELICAN ISLAND DEVELOPMENT CORPORATION,
Appellees

Appeal from the United States District Court for the Southern District of Texas

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(March 15, 1961)

Before TUTTLE, Chief Judge, HUTCHESON, Circuit Judge, and CLAYTON, District Judge.

HUTCHESON, Circuit Judge: This appeal is from findings and a judgment in admiralty in favor of the libellants, in a suit brought by them as owners of pipe lines, for damages resulting from their negligence destruction in the course of shifting the M/V Har Canaan as a dead ship to a slip in Galveston Harbor.

A great deal of testimony was taken on the issue of fault, and the district judge made full findings in effect that the destruction of the pipe lines was due to the negligence of the respondent, Emmett Gray, port captain for G & H Towing Co., who was furnished by it as a pilot for the dead ship movement.

Based on these findings, the court adjudged: (1) Gray liable; (2) the Har Canaan liable in rem; (3) Maritime Overseas, owner of the Har Canaan, not liable in personam; and (4) G & H Towing Co., the employer and furnisher for the movement of Emmett Gray, its port captain liable in personam. He als denied and awarded indemnity as follows:

> "Thus, as to the liability over between the several respondents, the following conclusions are made.
>
> "6. G & H Towing Company and Captain Emmett Gray are not entitled to indemnity from Maritime Overseas Corporation, or from the Har Canaan, for any payment they may be required to make under the decree to be entered herein.
>
> "7. Maritime Overseas Corporation, as claimant of the Har Canaan, is entitled to indemnity from Captain Emmett Gray, individually, and from G & H Towing Company for any liability it will have to libellants under the decree to be entered herein. The liability of Captain Gray and G & H Towing Company to Maritime Overseas will be joint and several."

Gray, as the respondent held primarily liable, here insisting that the findings and conclusions, that he was negligent in handling the ship so as to cause injury to the pipe lines, are clearly erroneous, launches massive attacks upon the findings, that he was negligent, and urges upon

us that the cause of the injury to the pipe lines was negligence not on his part but on the part of the pipe line owners in not properly laying and maintaining the lines in place and in not clearly and properly marking their location.

The other appellants join him in this attack and argue mightily that the district judge has misconceived what actually occurred and that the findings of negligence are against the truth and right of the case.

The G & H Towing Company, in addition to its attack upon the negligence findings of the court, strongly attacks the court's conclusion, that the clause in its contract providing in effect that it would not be liable for the acts of pilots furnished by it would not avail it, as an erroneous conclusion of law, and urges that, because of that clause, Gray's negligence would not be imputed to it, and it could not, therefore, be held liable for it.

The Har Canaan and Maritime Overseas Corporation, its owner, argue vigorously that they were not responsible and cannot be held liable for the negligence of the pilot. Each of these argues that the conclusions on indemnity are wrong.

For the reasons hereafter stated, we are of the opinion: that the district judge was right throughout in his findings of fact and in his conclusions of law, that Gray was guilty of negligence in causing the anchor to be dropped upon the pipe line, and that, as a result of his negligence, he and the other respondents found liable are liable to the pipe line owners for the damage done them; and that the right of exoneration, action over, or indemnity is as he concluded it to be.

Taking up first the primary question of whether the findings of fact as to fault should be set aside, we think

it sufficient to briefly say that the matter of fault or negligence is a disputed issue, and that, on the record as a whole, there was ample evidence for the district judge to find, as he did: that Gray and, therefore, the Har Canaan and its owners, and the G & H Towing Company knew that the pipe lines were laid in the slip under permit; that the burden was heavily upon them to show, in defense of their act in dropping the anchor, that they had made proper inquiries as to just where they were laid; and that due care had been used in dropping the anchor to avoid striking and injuring them in the course of the ship's movement; that, in short, Gray and the other respondents could not shift liability for the affirmative acts causing injury to the pipe line as a result of dropping the anchor on the lines by complaining here that, as matter of law, the pipe line owners were at fault in not marking more precisely the position of the lines, or that the findings that they were not are clearly erroneous.

In declaring these views, we are not holding that the district judge could not have found the fault and responsibility as these contend he should have. We are holding, though, that it was entirely proper for the district judge to find, as he did, upon the whole facts, that the proximate cause of the injury sued for was the failure of Gray to use due care to find out just where the pipe lines were, in that, without soundings or otherwise taking adequate precautions to precisely locate the pipe lines, he dropped the anchor on them with damaging results.

With the highly important question of primary fault for the injury thus disposed of by our holding that the court's findings as to Gray's negligence are not clearly erroneous and must be approved, we turn to the other questions raised by the several appellants.

The first of these is the complaint of all the appellants, including Gray, that the district judge erred in refusing to give effect to the pilotage clause[1] in the towing contract, providing in effect that neither Gray nor the Towing Company, his employer, would be liable for the negligence of Gray, its employee, indeed its port captain.

Of this, we think it sufficient to say that we agree with the district judge's conclusion that the libellants, strangers to the contract, cannot, of course, be held bound, or in any way affected, by its terms; and also with his conclusions with respect to actions over for exoneration or indemnity that appellants are bound and precluded by the decision and holding in *Bisso v. Inland Waterways Corporation*, 349 U.S. 85, that such a clause is invalid. In addition, we think it clear that respondents' reliance on *Sun Oil Co. v. Dalzell Towing Co.*, 287 U.S. 291, will not at all do there, both because of the decision in the Bisso case, which, on full consideration, rejected the Dalzell case as authority for the position here taken, and because the Dalzell case dealt with pilotage in its real sense of service rendered by publicly licensed involuntary or compulsory pilots, and Gray in the case was not such a pilot. Though called a pilot, he was merely the person in direct command with respect to a dead ship towing operation

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1 "Whenever any pilot goes on board a vessel to assist her movement or handling, he becomes and continues to be solely the servant, agent and employee of said vessel, and her owners and/or charterers in respect of all acts done by him, or all omissions, and all orders given by him to any tugs engaged or to said vessel, or otherwise, in the movement or handling of said vessel, or in connection with any decisions made by said pilot as to the manner or method of handling said vessel, and none of the tugs or their owners, agents, masters, servants, employees or charterers shall be responsible or liable for any act or omission of said pilot, or for any claims or damages caused by or resulting for (sic) any act, omission or order of said pilot."

who, as such, conducted the operation by coming on board. Look at it as one will, nothing more can be made of this case than that it is a mere case of a towing service furnished by G & H Towing Company and performed by its port captain who, though denominated "pilot", was merely the one in charge of a dead ship towing operation who conducted it by coming on board the dead ship, and the effort to limit the liability of the towing company for the acts of those furnished by it to conduct the towing maneuver must fail here, just as it failed in the Bisso case, and the judgment denying effect to the invoked clause of the contract must be affirmed.

We are also of the opinion that there is no merit whatever in Gray's claim that he is protected from liability for his own fault by the terms of the contract, even if it were otherwise regarded as valid. Neither is there any merit in the claim of Maritime Overseas Corporation and Har Canaan, that they are not liable for Gray's acts because, under the law governing pilotage, they could not be held liable for the pilot's negligence. We find nothing in the cases cited by them, nothing in the cases generally, which supports this claim. Indeed, we think the cases have settled the law to the contrary, even in a case of true involuntary or compulsory pilotage. Cf. *Publicker Industries, Inc. v. Tug Boat "Neptune" Company et al*, 171 F.(2) 48; *United States v. Chris Nielson*, 349 U.S. 129. We are, therefore, of the clear opinion that the court's findings of fact as to fault in the injury to the pipe lines cannot be set aside as clearly erroneous; that his conclusions, that the respondents held liable were in fact and in law responsible to the libelants, are correct and may not be set aside; and that all questions as to actions over for exoneration and/or indemnity were correctly decided, and the decree is in all things AFFIRMED.

APPENDIX II.

No. 18619

JUDGMENT (OF THE COURT OF APPEALS)

Extract from the Minutes of March 15, 1961

EMMETT GRAY, G. & H. TOWING COMPANY, and MARITIME OVERSEAS CORPORATION,
Appellants

v.

EDWIN E. JOHANSSON, KANSAS CITY BRIDGE COMPANY, MERRITT-CHAPMAN & SCOTT CORPORATION and PELICAN ISLAND DEVELOPMENT CORPORATION,
Appellees

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the decree of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered, adjudged and decreed that the appellants, Emmett Gray and G. & H. Towing Company, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

APPENDIX III.

FINDINGS OF FACT AND CONCLUSIONS OF LAW (OF THE UNITED STATES DISTRICT COURT)

STATEMENT OF THE CASE

This proceeding is brought in rem against the Israeli vessel HAR CANAAN, claimed by Maritime Overseas Corporation; in rem against the Tug J. R. GUYTON, owned by Bay-Houston Towing Company; in rem against the Tugs JUNO and ALBATROSS, owned by Suderman & Young Towing Company; and in personam against Bay-Houston Towing Company; Suderman & Young Towing Company, and G. & H. Towing Company, the charterer and operator of the three tugs named, and Emmett Gray, an individual, employed as Port Captain by G. & H. Towing Company. The Libellants are Pelican Island Development Corporation, the owner of the pipeline work which was damaged in this casualty; Merritt-Chapman & Scott Corporation, general construction contractor for the Pelican Corporation; Edwin E. Johansson, sub-contractor under Merritt-Chapman & Scott for construction of water and sewer pipelines between Galveston Island and Pelican Island; and Kansas City Bridge Company, sub-contractor under Johansson for the cross channel portion of this construction which was immediately involved. By impleading petition of cross-libel, Maritime Overseas Corporation asks indemnification from the Tugs J. R. GUYTON, JUNO, and ALBATROSS, and from all the named respondents, for any recovery libellants may obtain against the HAR CANAAN or her claimant, and by impleading petition or cross-libel, those same respondents jointly and severally ask indemnification from Maritime Overseas Corporation for any recovery libellants may obtain against them.

A trial having been had on the issues of liability alone, and having received and considered the evidence and the briefs and arguments of the proctors for the respective parties, these Findings and Conclusions are made by me pursuant to Admiralty Rule 46½.

FINDINGS OF FACT

1. The channel between Galveston Island and Pelican Island is a part of the Galveston harbor. Slip A is immediately west of Pier 41 on the Galveston Island or southerly side of this channel. The width of the channel at this point is approximately 1400 feet, and the channel at this point is dredged to a depth of approximately 35 feet between the harbor lines, a distance of 1125 feet.

2. On April 12, 1956, a permit was issued to libellants through the office of the United States Corps of Engineers for the construction of water and sewer mains, each approximately 12 inches in diameter, to be laid in a trench across the Galveston channel, and at a depth not less than 50 feet below mean low water. By amendment of the permit on December 16, 1957, the center line for this crossing, at the southerly or Galveston Island end, was established at a point which the evidence shows to be approximately 18 feet eastward from the northeast corner of Slip A, and the line of bearing for the crossing from that point was N 10° 23′ 25″, or almost directly across the channel to a point opposite on Pelican Island.

3. Acting under this permit, as originally issued and so amended, Merritt-Chapman, as general contractor for the Pelican Corporation, contracted with Johansson for the construction of these pipelines, and Johansson in turn subcontracted to Kansas City Bridge Company that part of the work which involved laying the sub-aqueous lines. A

trench was dredged across the channel to the necessary depth of 51½ feet, which was approximately 16 feet deeper than the normal depth of the channel between the harbor lines. The dredged trench followed the center line of the crossing as established by the amended permit, and extended about 50 feet to either side of that centerline. This portion of the work was completed prior to November 27, 1957, and soundings of the trench were made by the United States Corps of Engineers on that date. Late in 1957, Kansas City Bridge Company began receiving sections of the steel pipe to be laid at a job site at the Pelican Island end of the crossing, and for sometime thereafter was engaged in welding short sections of this pipe into 400 foot lengths, testing the welds, and covering this pipe with a protective wrapping. Meanwhile, in December, 1957, and January, 1958, a large "whirley" or crane barge was used to dredge the ends of the trench outside of the harbor lines. A cavein of the bulkhead at the northeast corner of Slip A, caused by this dredging, was repaired in December, 1957. In January, 1958, a bulldozer was used to cut a 400 foot ditch on Pelican Island into which the long sections of pipe could be placed preparatory to their being drawn into the water.

4. On January 27, 1958, pulling cables were stretched across the channel, and the leading section of each pipeline was hung below a barge at the Pelican Island end. On the ensuing four days, the two pipelines were drawn behind this barge and laid in the trench across the channel which had been dug to receive them. On January 31, 1958, the channel was cleared again for marine traffic. Between February 6 and February 25, 1958, the whirley barge was employed as riser sections were welded to the two pipelines, first at the Galveston Island end, then the Pelican Island end. Between February 27 and March 4, 1958, divers were used to walk the pipelines and ascertain their position

and alignment. The whirley barge was used to uncross the lines at one point in mid-channel during this work. On March 5, the lines were filled with water for hydrostatic pressure tests, and they remained filled with water until the later casualty.

5. The remaining work on the pipelines prior to the casualty in suit, which occurred on March 21, 1958, was concerned with the construction of a thrust block over the risers at the Galveston Island end, just east of the entrance to Slip A, and immediately in front of the bulkhead between Slip A and Pier 41. Sleeves were welded around the risers where they passed through the bulkhead, a wooden form was constructed for the thrust-block, and this was lowered into place over the risers after the ground had been cleared by a diver. On the morning of March 21, and at the time of the casualty, concrete was being poured for this thrust-block. A diver was then below directing this work, and his tenders were on the deck of the whirley barge which lay at the northeasterly corner of Slip A, and partly into that Slip. The crane of the whirley barge extended over the work area. On the channel side of the bulkhead, a small "sea mule" and a larger flat barge were immediately above and adjacent to the work area, and personnel employed by Kansas City Bridge Company were on these work boats as well as upon the bulkhead.

6. In addition to the physical evidence already related showing the construction and placement of these pipelines across the channel, and to the notice thereof contained in the permit issued by the United States Corps of Engineers, at least three "Notices to Mariners" had been issued by the Corps of Engineers, on November 15, 1957, December 23, 1957, and January 16, 1958 advising of this construction. On December 30, 1957, double signboards, measuring

7 feet 10 inches, by 16 feet, on each face, and bearing large letters reading "WARNING—PIPE CROSSING—DO NOT DRAG ANCHOR" were placed on either side of the channel, the sign on the Galveston side being centered about 31 feet east of the center line established for the crossing, and the sign on the Pelican side being centered about 115 feet east of this center line. The legend of either sign was easily visible to any ship proceeding up or down the channel.

7. The Israeli ship HAR CANAAN is a dry-cargo vessel of 10,311 gross tons. Her length is 515 feet 2 inches, and her beam is 66 feet 7 inches. She carried two anchors forward, each weighing approximately 8900 pounds. At the time of this casualty the ship was light and drawing approximately 10 feet. Her forecastle deck was approximately 40 feet above the water line, her bridge deck was approximately 60 feet above the water line, and the horizontal distance from the hawse-pipes in the bow of the ship to the bridge was about 200 feet.

8. On the morning of March 21, 1958, the HAR CANAAN was fully manned, equipped and seaworthy excepting that her main engines were shut down for repairs. Her agents at Galveston, Strachan Shipping Company, gave an order to Bay-Houston Towing Company to furnish three tugs and a pilot to move the HAR CANAAN as a "dead" ship from Pier 15, where she was then lying, to Sunset Grain Elevator at the inner end of Slip A. The distance between these points was approximately two miles.

9. Bay-Houston Towing Company held a contract with Maritime Overseas Corporation, operator of the HAR CANAAN, to move its vessel on stated rates and terms.

10. The only towing companies offering tug service for shifting ocean going vessels in the port of Galveston at

the time in question were Bay-Houston Towing Company, Suderman & Young Towing Company, and Intracoastal Towing & Transportation Company. Each of these companies owned a number of harbor tugs. These three "owning companies" competed with one another in the sense that they solicited their own business, made their own contracts, and invoiced the towed vessels for the service performed. However, the services which were available to the owners and operators of ocean going vessels in the port of Galveston from the three "owning companies" were identical. This comes about in that the three "owning companies" did not operate their own tugs, but all three chartered, bareboat, their tugs to G. & H. Towing Company, an operating Company, which was owned jointly by the three "owning companies". In carrying out the orders for towing service, G. & H. Towing Company would use the tugs which were most readily available and convenient, without regard to the ownership, and regardless of which of the three "owning companies" may have had the contract with the vessel to be towed. The contracts between the "owning companies" and the vessels (or their owners or charterers) expressly allowed for performance in this manner. The contracts offered by the three "owning companies" (their owners or charterers) were identical in terms, and upon a single printed form. The rates too were the same, save for an exclusive contract a ten percent (10%) reduction was allowed. The contract with Maritime Overseas was of this nature, and carried the ten percent (10%) discount.

11. Among the other provisions of this contract, to which reference is made for all purposes, was the following provision, which by reason of its significance is quoted here:

> "Whenever any pilot goes on board a vessel to assist her movement or handling, he becomes and continues to be solely the servant, agent and employee of said vessel, and her owners and/or charterers in respect to all acts done by him, or all omissions, and all orders given by him to any tugs engaged or to said vessel or otherwise, in the movement or handling of said vessel, or in connection with any decisions made by said pilot as to the manner or method of handling said vessel, and none of the tugs or their owners, agents, Masters, servants, employees or charterers shall be responsible or liable for any act or omission of said pilot, or for any claims or damages caused by or resulting for any act, omission or order of said pilot."

12. Captain Emmett Gray, one of the respondents, is full time and salaried employee of G. & H. Towing Company. Prior to March 1, 1958, he had served for several years as night dispatcher for G. & H., and on that date he became Port Captain for G. & H., and was placed in full charge of the dispatching office. Since 1932, he has held an unlimited pilot's license covering Galveston harbor, as well as other adjacent waters. As Port Captain for G. & H., he was the "dead ship" pilot assigned by his employer for all shifting of dead ships within Galveston harbor when the tugs operated by G. & H. were employed. Out of the fixed charge made for shifting a vessel without her power, Captain Gray received a percentage of this charge (in addition to his salary from G. & H.), with the balance of the charge going to the company owning the contract (one of the three "owning companies"), and G. & H. as the operating company. In this regard, it should be noted that Captain Gray's duties with G. & H. did not contemplate, nor did he accept, employment as a harbor or branch pilot (meeting incoming vessels at the sea buoy, and bringing

them, usually under their own power, into Galveston harbor, with converse service for out going vessels.)

13. On the morning of March 21, 1958, Captain Gray boarded the HAR CANAAN as she lay at Pier 15, and assumed the conning of the vessel. He informed her Master of his intention to use the port anchor in turning the ship into Slip A, and the First Mate of the HAR CANAAN, with a deck crew, was stationed in her bow and the anchor made ready for use on orders from the bridge. Thereupon, the HAR CANAAN was moved westerly down the channel toward Slip A, with the Tugs JUNO, ALBATROSS, and J. R. GUYTON, made up alongside and providing the only motive and directional power for the vessel under orders given directly to them by Captain Gray from the bridge of the HAR CANAAN. The Master of the HAR CANAAN was also upon the bridge of his vessel at all times during the maneuver, and he relayed to the First Officer in the bow and the crew orders as received from Captain Gray during the maneuver, including the order to let go the port anchor. The helm of the HAR CANAAN was lashed, as her propelling machinery was shut down, and she had no steerageway of her own.

14. Shortly after noon, as the HAR CANAAN reached the vicinity of Pier 41, she was navigated by the tugs at an angle from the center of the channel toward the opening of Slip A. Captain Gray then ordered the port anchor to be dropped, with one shot of chain, and this order was promptly executed. Subsequently, the bow of the ship, with anchor down, continued to move toward the northeast corner of Slip A and came within about 10 feet of contact with the whirley barge in that position before the anchor was heaved in some five minutes later. Almost immediately after the anchor was dropped, violent move-

ments of the sewer pipe, which was westerly of the two pipes being laid, were perceptible to the workmen on shore as well as to the diver working underwater. Sounds such as would have been caused by the breaking of the pipeline were also heard by the workmen on shore when the anchor of the HAR CANAAN was heaved in. Subsequent investigations did show that the sewer line was badly bent or broken, but still in the trench, at a point approximately 250 feet out in the channel, and was completely broken at a point only 90 feet from the bulkhead, with the ends of the pipe at this point pulled out of the trench and lying in front of the opening to Slip A.

15. Immediately prior to the arrival of the HAR CANAAN at Slip A on the 21st of March, 1958, the water and sewer lines were being constructed by libellants in accordance with the permit duly issued for that purpose, and these two pipelines were properly situated at the depth and in the position prescribed in such permit, as amended December 16, 1957.

16. The port anchor of the HAR CANAAN was dropped on, or dragged over, one, or perhaps both of said lines, on March 21, 1958, breaking the sewer line, the more westerly of the two, and causing damages to each of the libellants in amounts to be determined.

17. Captain Gray was negligent in giving the order to drop the anchor when he should have been aware of the construction and presence of the pipelines from general knowledge, the Notices to Mariners, and the prominent warning signs which were plainly visible.

18. Captain Gray was not misled by the position of the warning signs, and was negligent in giving the order to drop the anchor without regard to the presence of the pipelines.

19. The tide was nearing the end of the ebb, and the wind was from the southeast at force three, although neither weather, wind nor tide were factors of any consequence in the handling of the HAR CANAAN at the time, and no emergency or necessity required that the anchor be dropped at the place where it was dropped.

20. Captain Gray was acting within the scope and course of his employment by G. & H. Towing Company at all times material hereto, and was not a loaned servant to the vessel or her operators at such times.

21. The Master of the HAR CANAAN was not negligent in failing to intervene, or displace, the pilot when the order to drop the anchor was issued by Captain Gray, because the situation was not one of obvious danger, and the pilot's lack of knowledge was not manifest so as to warrant intervention by the Master.

22. Neither the Master nor crew of the HAR CANAAN was negligent, or at fault, in any particular.

23. The assisting tugs were properly maneuvered by their crews in accordance with orders given them, and were in no way at fault.

CONCLUSIONS OF LAW

1. Captain Emmett Gray is personally liable for his own acts of negligence.

2. G. & H. Towing Company is liable for the negligence of Captain Gray as its employee.

3. The HAR CANAAN is liable, *in rem*, for the negligence of Captain Gray as her pilot

4. Libellants are entitled to recover their provable damages, as their interests may appear, from the HAR CANAAN, *in rem*, from G. & H. Towing Company, *in personam*, and from Emmett Gray, individually. The liability so decreed shall be joint and several.

5. Libellants are not entitled to recover from the tugs J. R. GUYTON, JUNO, or ALBATROSS, in rem, or from Bay-Houston Towing Company or Suderman & Young Towing Company, in personam.

The foregoing Conclusions dealing with the liability of the respondents to libellants, in my judgment, follow quite readily from the Findings of Fact set out above, and present no serious question of law.

The libellants obviously were not parties to the contract of towage between Maritime Overseas and Bay-Houston, and the liability of respondents to libellants has been determined without regard to the provisions of such contract.

In considering the question of liability over between the various respondents, however, the validity of the so-called "pilotage" clause (Finding No. 11) is placed in issue.

Maritime Overseas contends such provision is void, as contrary to public policy, relying primarily on *Bisso v. Inland Waterways Corp.*, 349 U.S. 85, and the related opinions immediately following. Respondents G. & H. and Captain Gray in supporting the validity of the exculpatory provisions rely primarily on *Sun Oil Co. v. Dalzell Towing Co., Inc.*, 287 U.S. 291.

Under the facts found above, in my judgment, *Bisso* is controlling, by reason of the following circumstances, which I consider to have been stressed by the Court; (a) the vessel was being moved entirely under the power of the furnished tugs, and without power or control of her own; and (b) by reason of the monopolistic situation which prevailed in the vicinity of Galveston harbor, whereby a vessel had no freedom of choice in the type of towing contract offered, but must accept a contract with such exculpatory provisions if in fact it was to secure the assistance of tugs in its movement. Here, as in *Bisso*, the vessel was under complete control of Captain Gray, as an em-

ployee of the towing company, and such towing company did "have power to drive hard bargains."

The instant case is distinguished from *Dalzell* in these same particulars, for there the Court points out (a) "It was not shown that respondent was to have or at any time did have control of the tanker or that it agreed or undertook to do more than to furnish tugs to assist her while using her own propelling power."; and (b) "Respondent had no exclusive privilege or monopoly in respect of the services that petitioner desired to have performed for its tanker. . . . There is nothing to suggest that the parties were not on equal footing or that they did not deal at arm's length."

Thus, as to the liability over between the several respondents, the following Conclusions are made.

6. G. & H. Towing Company and Captain Emmett Gray are not entitled to indemnity from Maritime Overseas Corporation, or from the HAR CANAAN, for any payment they may be required to make under the decree to be entered herein.

7. Maritime Overseas Corporation, as claimant of the HAR CANAAN, is entitled to indemnity from Captain Emmett Gray, individually, and from G. & H. Towing Company for any liability it will have to libellants under the decree to be entered herein. The liability of Captain Gray and G. & H. Towing Company to Maritime Overseas will be joint and several.

The Clerk of the Court will furnish counsel of record a copy hereof.

Counsel will present appropriate order promptly.

Done at Houston, Texas, this 24th day of December, 1959.

BEN C. CONNALLY
United States District Judge

APPENDIX IV.

TUGS:

C. R. HADEN
H. O. WEATHERBEE
J. R. GUYTON
JENNIFER GEORGE

LAURA HADEN
JUDY HADEN
R. T. McDOW
R. J. WALES

W. A. WANSLEY

[redacted] BARBARA GEORGE
HARRIS MASTERSON

TUG BOAT HARBOR TARIFF

EFFECTIVE APRIL 10 1957

BAY-HOUSTON TOWING CO

GALVESTON

504 National Hotel Bldg.
Phone 5-9381
Pier 10 Wharf Phone 3-4673

Night Phones { 3-4673 - 5-7534 / 5-6542

HOUSTON

811 Cotton Exchange Building
Phone: CApitol 2-6231
Dock Phone: WAlnut 8-5406

Night Phones { J Jackson 4-8635 / UNderwood 9-2701

CORPUS CHRISTI

Ore Dock
Phone: TUlip 4-8791 & TUlip 3-7843
Night Phone: 52 Ingleside

Gulf Coast Towing, Harbor Towing, Oil Lightering and Transportation

OIL BARGE IPS 201

CORRESPONDENCE AND WORK SOLICITED

B Tug Calls:_____ **(Long, Short, Long)**
H Tug Calls:_____ **(Long, Short, Long, Short)**

TOWBOAT HARBOR TARIFF
GALVESTON, TEXAS CITY AND HOUSTON SHIP CHANNEL

ASSISTING VESSELS

GALVESTON — TEXAS CITY

Docking or Off Docking, at Galveston, per tug	$180.00
Shifting, Dock to Dock, per tug	205.00
Off docking and to Bolivar Roads, per tug	230.00
Off docking and to Texas City and Docking, per tug	330.00
Bolivar Roads to Texas City or vice-versa, per tug	230.00
Docking, Off Docking, or Shifting at Texas City, per tug	230.00
Towing vessels or ocean-going barges from Galveston Bar to Bolivar Roads, Texas City or Galveston Docks, per tug. Per hour or fractional part Running time chargeable.	105.00
Shifting derrick barges—Galveston Harbor	85.00
Galveston to Bolivar Roads	85.00
Galveston to Texas City	135.00
Pilotage—Shifting Vessels Without Own Power	60.00

SPECIAL SERVICES

Pulling on ships aground When tug is engaged in assisting vessel, one-half hour free pulling time, each succeeding hour or fractional part	$ 90.00
When Tug not engaged in assisting vessel: Per hour or fractional part Running time chargeable.	95.00
Furnishing and delivering water to ships at anchorage: Per Trip	200.00

IN TOWING VESSELS OR BARGES, TOWED VESSELS TO FURNISH HAWSERS.

When Tug ordered to certain points to perform services and orders cancelled after Tug leaves berth, minimum charges of $60.00 at Galveston and $90.00 at Texas City will be made.

DETENTION

Detention caused by vessel not being ready at time specified when tug ordered to be charged for at $60.00 per hour, with one-half hour free time allowed.

HOUSTON SHIP CHANNEL

BETWEEN	
Morgan's Point and Ordnance Depot, Shell, Port Adams, Todd Shipyards or Sheffield	$380.00
Morgan's Point and Baytown	230.00
Bolivar Roads and Morgan's Point or Baytown	470.00
Bolivar Roads and Ordnance Depot, Shell, Port Adams, Todd Shipyards or Sheffield	455.00
Galveston and Baytown	440.00
Texas City and Baytown	440.00
Houston and Norsworthy, Crown, Galena or Sinco	240.00
Houston and Todd Shipyards, Port Adams, Sheffield, Shell or Ordnance Depot	330.00
Galveston and Houston	580.00
Bolivar Roads and Houston	580.00
Texas City and Houston	580.00
Morgan's Point and Houston	430.00
Houston and Baytown	405.00
Baytown and Ordnance Depot, Shell, Port Adams, Todd Shipyards or Sheffield	380.00

(Norsworthy, Crown, Galena, Sinco, Clinton, Manchester take same rates as Houston from above points.)
Above charges including Docking or Off Docking.

TOWBOAT HARBOR TARIFF
GALVESTON, TEXAS CITY AND HOUSTON SHIP CHANNEL

HOUSTON SHIP CHANNEL
DOCKING AND OFF DOCKING

Docking or Off Docking at all points between Manchester Terminal and Turning Basin, both inclusive	$185.00
Docking or Off Docking at points below Manchester to Norsworthy, inclusive	150.00
Docking or Off Docking at points below Norsworthy to Ordnance Depot, inclusive	230.00
Docking or Off Docking at Baytown	250.00

SHIFTING

Shifting vessels between docks at Manchester Terminal and Turning Basin, both inclusive, per tug	$200.00
Shifting vessels between points below Manchester to Norsworthy, inclusive, per tug	230.00
Shifting vessels from one point to another on the same dock between points below Norsworthy to Ordnance Depot, inclusive	290.00
Shifting vessels between points below Norsworthy to Shell, inclusive, per tug	330.00
Shifting from one berth to another at Baytown	230.00

MISCELLANEOUS SERVICES

Pulling on ships aground	
When tug is engaged in assisting vessel, one half hour free pulling time, each succeeding hour or fractional part	80.00
When tug is not engaged in assisting vessel, per hour or fractional part	95.00
Running time chargeable	

The above rates to apply for a single tug

Tugs ordered to stand by but not put to work will be charged for the same as if pulling

Rates for towing dead ships between points on Houston Ship Channel, other than above specified, will be charged for on "pulling time basis"

All towed vessels to furnish towing hawsers

Holding vessels off dock and redocking, shifting rates to apply

Standing by or holding vessel in stream or alongside bank waiting for berth, pulling time rate will apply

When Tug ordered to certain points to perform services and orders cancelled after Tug leaves berth, minimum charge of $80.00 will be made

Furnishing and delivering water to ships, Per Trip	200.00

DETENTION

Detention caused by vessel not being ready at time specified when tug ordered to be charged for at $80.00 per hour with one-half hour free time allowed

PORT ARANSAS — CORPUS CHRISTI

Docking, off docking or shifting at Harbor Island	$280.00
Assisting between Harbor Island and Corpus Christi	430.00
Sea to Ingleside	380.00
To dock at Ingleside:	
When tug is at Ingleside	290.00
When tug is not at Ingleside	380.00
Assisting between Ingleside and Harbor Island	380.00
Assisting between Ingleside and Corpus Christi	380.00
Sea to Corpus Christi and dock	430.00
From outside bridge at Corpus Christi and to dock at Turning Basin wharves	210.00
To dock at wharves in Corpus Christi Turning Basin	180.00
Shifting in Corpus Christi Turning Basin	205.00
Sea to Terminal of the Reynolds Metal Company (Near Ingleside)	395.00
Docking or undocking at the Terminal of the Reynolds Metal Company (Near Ingleside)	195.00
From outside bridge to all points between Sunray Dock, and Oil Docks 3 & 4, inclusive	230.00
From Turning Basin inside the bridge to above docks	220.00
To docking or off docking at above docks	220.00
To shifting between above docks or between above docks and docks in Corpus Christi Turning Basin	230.00
Pulling on ships aground:	
When tug is engaged in assisting vessel, one half hour free pulling time, each succeeding hour or fractional part	80.00
When tug is not engaged in assisting vessel, per hour or fractional part	95.00
Running time chargeable	

When Tug ordered to certain points to perform services and orders cancelled after Tug leaves berth, minimum charges of $80.00 at Corpus Christi and Harbor Island, and $90.00 at Ingleside will be made

The above rates to apply for a single tug

Detention—One half hour free time, thereafter, per hour	60.00
Furnishing and delivering water to ships at Harbor Island, Ingleside, or Corpus Christi, Per Trip	200.00

OVERTIME RATE

20% will be added to the tariff rates for all work performed between the hours of 5 P.M. and 7 A.M., also for work performed on Sundays and Holidays and Mondays following Holidays

Overtime Rate to apply when service is started and/or completed in an overtime hour

Starting time will be the time Tug leaves berth and time of completion will be the time Tug returns to berth

FORCE MAJEURE

Neither party shall be responsible for delays, failures or omission hereunder due to strikes, lockouts, labor disturbances, riots, fire, earthquakes, storm, lightning, epidemics, war disorders, acts of God, etc.

The rates quoted herein, and the furnishing of tug power for harbor or other towage undertaken hereunder, are founded on the consideration that this agreement shall not be construed to be a personal contract, and it is understood that

BAY-HOUSTON TOWING COMPANY

and the parties at interest with us shall have the benefit of the exemption from liability contained in the United States Limitation of Liability Statute, Title 46 U.S.C.A. 181 to 184, both inclusive.

_____, 195__

The Bay-Houston Towing Co. offers to meet your steamers upon arrival at Galveston, Houston, Texas City, Corpus Christi, or Port Aransas, and provide tugboat power for your steamers while in port, in accordance with towboat tariff shown herein and conditions named therein.

Should Bay-Houston Towing Co. tugs be not conveniently available for the required services, the said Bay-Houston Towing Co. shall have the right to designate or engage the tugs, and such other tugs and their owners or operators shall be covered by this contract as though they were Bay-Houston Towing Co. tugs.

Whenever any pilot goes on board a vessel to assist her movement or handling, he becomes and continues to be solely the servant, agent and employee of said vessel, and her owners and/or charterers in respect of all acts done by him, or all omissions, and all orders given by him to any tugs engaged or to said vessel or otherwise, in the movement or handling of said vessel, or in connection with any decisions made by said pilot as to the manner or method of handling said vessel, and none of the tugs or their owners, agents, Masters, servants, employees or charterers shall be responsible or liable for any act or omission of said pilot, or for any claims or damages caused by or resulting for any act, omission or order of said pilot.

This contract to become effective on the date shown above and to remain in force until _____ and to continue thereafter from year to year until cancelled by either party on an anniversary date of this contract. After written notice, rates named herein may be adjusted in the light of increase or decrease in operating expenses due to changes in laws or regulations and changes in working conditions of labor and labor costs in all branches.

All charges are net, except when services are performed under contract, then a discount of ____% is to apply on all tariff rates.

BAY-HOUSTON TOWING COMPANY

By _____

ACCEPTANCE

We accept the offer of the Bay-Houston Towing Co. for all tug power our steamers, or steamers operated for our account, unless otherwise bound by charter may require at the Ports of Galveston, Houston, Texas City, Corpus Christi and Port Aransas, in accordance with the rates and conditions named in tariff shown herein.

_____

By _____

APPENDIX V.

1961 AMERICAN MARITIME CASES

INTERNATIONAL TERMINAL OPERATING CO., INC., Libellant
vs.
NAVIERA AZNAR S.A., S. S. MONTE URQUIOLA, TUG FRANCES TURECAMO, B. TURECAMO TOWING CO., B. TURECAMO COASTAL & HARBOR TOWING CORPORATION, TUG KATHLEEN TRACY AND M. & J. TRACY, INC., Respondents.

United States District Court, Southern District of New York
March 16, 1961.
In Admiralty—No. 19832

COLLISION—232 Presumptions—PILOTS—133 Liability of Owner of Vessel—TOWING—113 Exemptions from Liability—Pilotage Clause—1612 Helper Tug

Pier owner sued for damage to pier caused by steamship while being undocked under her own power with the assistance of two tugs, one at the bow and the other at the stern. **Held:** The owner of the bow tug and the steamship owner were jointly and severally liable for the damage. (1) The contact with the pier raised a presumption of negligence against all parties assisting in the management of the steamship which only the tug at the stern succeeded in rebutting. (2) Under the pilotage clause the pilot's negligence (proceeding too fast astern and delay in giving proper orders) was imputable to the steamship to the extent that the faults of a pilot are within the scope of the pilotage clause, his employer is entitled to indemnity from the shipowner. (3) Although operating under the pilot's supervision, the bow tug was independently at fault for failing to prevent the contact.

ALEXANDER, ASH & SCHWARTZ (Edward Ash, Advocate), Proctors for Libellant.

DAWSON & WAALAND (Thorolv T. Waaland, Advocate), Proctors for Respondent, Naviera Aznar S.A.

HILL, RIVKINS, MIDDLETON, LOUIS & WARBURTON (Henry C. Eidenbach, Advocate), Proctors for Respondents, B. Turecamo Towing Corp. and B. Turecamo Coastal and Harbor Towing Corporation.

MACKLIN, SPEER, HANAN & McKERNAN (John C. Hart, Advocate), Proctors for Respondent, M. & J. Tracy, Inc., and Claimant, W. J. T. Towing Line, Inc.

1758.

THOMAS F. MURPHY, D. J.:

This proceeding *in rem* and *in personam* arises out of damage to libellant's dock in Hoboken where the S. S. *Monte Urquiola* was moored and undocking on August 19, 1958, under its own power and with the assistance of two tugs.

Libellant sues the ship, the owners of the ship, and the tugs *Frances Turecamo* and *Kathleen Tracy* and their respective owners. At the beginning of the trial there was a concession that the libellant was the owner of the dock and respondents were the owners of the ships and tugs involved except that M. & J. Tracy, Inc. was conceded to be not the owner of the *Kathleen Tracy* but another Tracy Company was, and it was substituted in lieu thereof and the libel dismissed against M. & J. Tracy, Inc.

The ship was moored bow end in to the south side of Pier 9 so that its starboard side was next to the pier. The tide was ebbing and the wind moderate from the south or southwest. The time was about 7:15 p.m. One eye-witness, a tug captain who was standing on the bulkhead at the time, testified that at the beginning of the undocking operation the two tugs took positions at right angles to the ship, the *Tracy* tug into the port quarter and the *Turecamo* tug into the port bow. As the ship was moving astern he noticed that the *Turecamo* tug was pushing and he yelled to the foreman on the pier that it was going to hit the pier and the foreman yelled "no" that the fenders would stop it. In any event the ship's rake hit the steel girders and damaged the pier's superstructure. He testified, also, that as the stern of the ship was going downstream, the bow was pushed into the dock, and although he did not see any of the fenders break loose, he knew that one had broken loose

because he picked it up later and brought it back, though he could not say whether it was the one that was inshore or outshore.

The other eye-witness was an employee of the shipping company agent, who testified that the line from the *Turecamo* tug to the ship was slack and she was making no quick water. In other words, instead of pulling the bow out she permitted it to go in as the stern went out causing it to hit the pier.

Libellant's employee on the pier, i.e., the foreman who had charge of the lines, said that he was told by the mate on the ship to let go of the lines, as he saw the ship coming closer to door No. 12 where he was standing on the stringpiece, he ran away and when he came back he noticed that the ship had taken one of the fenders with it. The lines that moored the fenders were 4" in diameter. He said he never saw a ship pull out so fast.

The respondents' witnesses were, first, the captain of the ship, who said that he transferred the orders from the undocking pilot to the third officer; he said that when the pilot came aboard and everything was in readiness he so advised the pilot and was told to cast off all the lines. The pilot then gave the order for half-speed astern which is about 5½ to 6 knots or 40 revolutions. He testified further that he did not understand the signals that the pilot gave to the two tugs, one by the ship's whistle and one by mouth whistle; that he could not see the tug under the bow but he could see the stern tug and it appeared to be keeping the ship against the current; that he saw one of the fenders broken and floating with its moorings; that the pilot gave an order for a right rudder and that the pilot's orders were correct; that his ship had a draft of 17' aft and 12' forward and was on an even keel. On cross-examination he said that the "half-speed astern" order was the

only order given until the accident; that the order for a starboard rudder was after the accident; that the fender became loose a few seconds before the accident, and that at no time could he see the tug on the port bow. He testified that the ship is 148 meters long or 475′ and the pier on the south side 624′. It was a motor ship with one propeller and he admitted that in motion astern it has a tendency to go to its port.

The next witness for the ship was the company agent's employee who, in addition to what he testified to above, said that when he gave the order for the tugs to the tug dispatcher, they agreed on the undocking time to be one-half hour before mean low water, and the dispatcher said this would be O. K. with the two tugs. He also testified that the *Tracy* tug was doing all it could do and that the stern was down the river despite the work of the *Tracy* tug.

By stipulation Exhibit B was offered in evidence, which embodies the contract between the ship and Turecamo and contains the pilotage clause relieving the towing company of liability in certain instances. It provides:

"When the captain of any tug furnished to or engaged in the service of assisting a vessel which is making use of her own propelling power, goes on board such vessel, or any other licensed pilot goes on board such vessel, it is understood and agreed that such tugboat captain or licensed pilot becomes the servant of the owner of the vessel assisted in respect to the giving of orders to any of the tugs furnished to or engaged in the assisting service and in respect to the handling of such vessel, and neither those furnishing the tugs and/or pilot nor the tugs, their owners, agents, charterers, operators or managers shall be liable for any damage resulting therefrom."

The undocking pilot, Captain Joseph French, who worked for Turecamo at the time, testified that he gave the order

for the two tugs to take a position heading into the bow and stern and that he gave them the signal to work ahead slowly when the lines were let loose. He said he gave the orders for *slow astern* and that was executed. He then stopped the *Turecamo* tug by one whistle and gave the *Tracy* the signal of two whistles for full-speed, but when he saw the bow going into the pier he gave a two-blast signal to the *Turecamo* tug to go astern, which was acknowledged, but he could not see whether the order was carried out and the ship continued astern but the bow fell toward the pier. He then gave a hard right rudder order and the collision happened. After the ship was out in the stream he came back to help with the fenders and found that the one nearest the bulkhead had broken loose. He admitted in his examination before trial, and we find as a fact, that the lashings on the fenders broke due to the weight of the ship and the canting of the fender, just about the time of the collision on trial, he said just before the collision. In this examination he all but admitted that the accident happened because the *Turecamo* tug should have been able to, but failed to, hold her bow off the pier. She had enough power—1664 horsepower. He said that the stern of the ship was very near the end of the pier when they started and it was about one-quarter of the ship's length into the stream at the time of the accident and that the hard right rudder order was given about 30 seconds before the accident.

Captain Lyons who remained in charge of the tug *Frances Turecamo* also testified, and admitted that it was his job to keep the bow of the ship off the pier. He said he received one signal to come ahead slowly and another signal to stop, and he started to drift under the bow when he received a signal to go full astern but he said ' could not, and heard a noise and he was pulled under the bow.

Tracy produced two witnesses who did not testify but were offered for examination by any one. They were the alternate captain on the *Tracy* tug (the captain having died) and a deckhand.

The Turecamos claim indemnity over against the shipowner under the pilotage clause, if held liable, and the ship's answer was amended also to plead indemnity over against the Turecamo people.

The ship's log books were introduced (translations, as they were in Spanish) and they tended to support the captain and not the undocking pilot. In substance they say that at 19.15 the ship went one-half astern; at 19.19 it stopped and went slow astern, and at 19.20 when it was out in the stream it stopped again.

According to the logs it also appears that the accident happened at exactly 19.18, and it is described by the captain as "in view of a strong ebb tide and despite our efforts and the efforts of the tug boats we touched the pier."

It is the settled rule in admiralty that when a vessel comes in contact with a stationary object, there arises a presumption of negligence which operates against all parties participating in the mangement of the vessel at the time of the contact. *Patterson Oil Terminals, Inc. v. Port Covington*, 1952 A.M.C. 1745, 109 F. Supp. 953, 954-55, aff'd. 1953 A. M. C. 1371, 205 F. (2d) 694 (3 Cir., 1953). The burden rests upon those parties to rebut that presumption. We are satisfied from the evidence presented that the presumption has been sufficiently rebutted only as respects the *Tracy* tug and that, therefore, the libel must be dismissed as against that tug and its owners, and libellant is entitled to a decree against all other parties.

We find the pilot at fault in at least two respects, and, through him, the vessel and its owners as well as the pilot's

employer, Turecamo Coastal and Harbor Towing Corporation, who contacted to undock the vessel. *Pennsylvania Railroad Co. v. Beatrice*, 1958 A. M. C. 1612, 161 F. Supp. 136, 146-148, aff'd 1960 A. M. C. 1408, 275 F. (2d) 209 (2 Cir., 1960). The pilot was negligent in ordering the vessel to proceed astern at half-speed which, under the circumstances, was improvidently fast; he was also at fault in failing to exercise due care to see that the tug *Turecamo* was properly positioned to perform its function in the maneuver of keeping the bow of the ship away from the pier. From the testimony it appears that when he saw the bow of the vessel falling in to the pier he ordered the *Turecamo* to go astern, and while that was a proper order it was given too late for effective compliance therewith.

The pilot's negligence in handling the ship during the undocking operation was, of course, imputable to the ship *vis-a-vis* libellant. *Helen*, 1925 A. M. C. 267, 5 F. (2d) 54 (2 Cir., 1924). But cf. *Gypsum Queen—Tug Peerless*, 1953 A. M. C. 2071, 2078; *Logue Stevedoring Co. v. Dalzellance*, 1952 A. M. C. 1297, 1302, 198 F. (2d) 369, 373 (2 Cir., 1952), (dissenting opinion). We find too, that the *Turecamo tug* was at fault also and its fault contributed to the accident. Each tug, while under the general supervision of the pilot aboard the steamship, nevertheless acted independently and was obligated to so act insofar as its assigned duty or part of the maneuver was concerned. See *The Edward G. Murray*, 278 Fed. 895, 897. The *Turecamos* part of the work was to keep the bow off the pier. We find that it failed to exercise due care to avoid that contact which was plainly foreseeable and which good seamanship in performance of its task would have avoided. Cf. *Gypsum Queen—Tug Peerless*, *supra*, at 2078. Its fault created thereby independent liability *in rem* against the tug and *in personam* against its owner.

Insofar as we are concerned with the liability of the *Turecamo* tug, the steamship, and the owners of those two vessels to libellant, there is really no problem. There appeared to be a problem with respect to the cross-claims for indemnity but in view of our finding of independent fault on the part of the *Turecamo* tug, it has resolved itself.

With reference to the pilotage clause, the pilot was negligent, certainly with respect to "the handling of such vessel" and, arguably, with respect to "the giving of orders" to the tug *Turecamo*. He was also negligent in the use he made of that tug in the undocking procedure. In any event, his faults first mentioned are clearly within the purview of the pilotage clause and therefore operate to preclude indemnity in favor of the shipowner, because by virtue of that clause the pilot was the "servant" of the shipowner for the purpose of those actions. Cf. *West Eldara*, 1939 A. M. C. 877, 104 F. (2d) 670, 671 (2 Cir., 1939). If the faults of the pilot that are within the scope of the pilotage clause were the only basis for imposing liability upon the towing company that party would be entitled to indemnity from the shipowner in accordance with the terms of the towing contract. That is not the sole basis of the liability of the towing company however; at least the separate fault of the *Turecamo* tug operates to prevent the award of such indemnity.

In accordance with the foregoing the libel is dismissed as against the *Tracy* tug and its owners, and as to the remaining respondents, libellant is entitled to a decree in its favor holding them jointly and severally liable.

Settle decree with a provision for apportionment of damages equally between the ship interests and the towing company interests.

This memorandum is filed in lieu of findings of fact and conclusions of law.